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## THE LAW, RACE RELATIONS, AND THE ROSEBUD RESERVATION

David L. Garelick<sup>†</sup>

*Deadliest Enemies: Law and the Making of Race Relations On and Off the Rosebud Reservation.* By Thomas Biolsi. University of California Press, 2001. 232 pages. \$35.00.

The central question posed by Thomas Biolsi<sup>1</sup> in his book is: how did conflictual race relations come to be so deeply embedded in the social fabric of South Dakota? In grappling with that troubling question, Biolsi presents a comprehensive analysis of the conflict between Indian people and their white neighbors on and around the Rosebud Reservation. His focus on the history of a single tribe provides an excellent survey of some of the most critical issues in the field of federal Indian law. The depth of his study may also challenge practitioners to rethink their own basic assumptions regarding the root causes of racial tensions in Indian country.<sup>2</sup>

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1. Thomas Biolsi is a Professor of Anthropology at Portland State University. He is the author of *THOMAS BIOLSI, ORGANIZING THE LAKOTA: THE POLITICAL ECONOMY OF THE NEW DEAL ON THE PINE RIDGE AND ROSEBUD RESERVATIONS* (1992), and coeditor of *INDIANS AND ANTHROPOLOGISTS: VINE DELORIA, JR., AND THE CRITIQUE OF ANTHROPOLOGY* (Thomas Biolsi & Larry J. Zimmerman, eds., 1997).

2. The term "Indian country" is defined generally for criminal purposes in 18 U.S.C. § 1151 as follows:

Except as otherwise provided in sections 1154 and 1156 of this Title, the term "Indian country" as used in this chapter means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including any rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States, whether within the original or subsequently acquired territory thereof, and whether within or without the limits of the state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (2001). Although the United States Supreme Court has noted the relevancy of this definition in some civil matters, its significance for purposes

Professor Biolsi recognizes that one of the core assumptions in federal Indian law is the “deadliest enemies” hypothesis. This hypothesis, which was enunciated by the United States Supreme Court in its 1886 *United States v. Kagama* decision,<sup>3</sup> has taken root in both legal and lay circles alike. It assumes that the deadliest enemies of Indian tribes are the local non-Indians who live both in and around territory designated as Indian country. Indeed, this reader recalls that during his first class in federal Indian law, the instructor wryly stated that even if nothing else were imparted during the semester, students would do well to remember that the states remain the deadliest enemies of the tribes. Sadly, practice to date seems to confirm as much.

By way of introduction, Biolsi states that he will examine Indian-white relations by focusing on federal Indian law as a discourse comprising not only legal texts, but the interplay between texts, statements, practices, local knowledges, and social arrangements. He then makes it clear that he intends to demonstrate that this discourse structures practical thought and action, that it has done much by itself to demarcate political interests along racial lines and thereby produce racial politics and racial tensions in local settings.

Another stated aim of the book is to show that the “central energizer of the discourse—what drives its reproduction and its racial productivity” is the rampant contradiction in federal Indian law. While acknowledging that law in general is rife with inconsistency, Biolsi recognizes that federal Indian law is fraught with an exceptional degree of contradiction and indeterminacy, and the resulting uncertainty affects Indian-white race relations. In this context, he reviews some of the familiar contradictions present at the very creation of Indian law<sup>4</sup> and seizes upon what he

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of civil jurisdiction will vary depending on the circumstances. See AMERICAN INDIAN LAW DESKBOOK 35 (Nicholas J. Spaeth et al. eds., 1993).

3. 118 U.S. 375, 384 (1886) (stating “because of local ill feeling, the people of the States where [Indian tribes] are found are often their deadliest enemies”).

4. Two of the well established contradictions which Biolsi discusses are as follows: (1) The Declaration of Independence contains a racist binary in that it “counterpoises” men created equal against (later in the text) merciless Indian savages who would be denied the rights of men; and (2) The doctrine of discovery enabled the Europeans to take possession of North America, despite the occupancy of the natives, who were relegated to “heathen” status at the time; therefore, Indians were excluded from the scope of the Fifth Amendment’s private property protections. See THOMAS BIOLSI, DEADLIEST ENEMIES: LAW AND THE MAKING OF RACE RELATIONS ON AND OFF THE ROSEBUD RESERVATION 11-12 (2001)

characterizes as “the central tension animating the history of law and policy pertaining to American Indians in the United States—a conflict between Indian nations construed as members of distinct (sovereign) nations, and as a people *within* the United States.”<sup>5</sup> Put differently, Professor Biolsi states that the conflict can also be viewed as one between treaty rights, which belong to a unique people, (where Tribes and their members are seen as legally different from other Americans) and constitutional rights (where Indians are seen as basically the same as other Americans—“and to whom the same rules should, and eventually must, apply”).<sup>6</sup>

To further complicate matters, Professor Biolsi reminds us that Indian law has evolved over a historical sequence of contradictory moments of “assimilation” and “separatism,” which take their force from the political and judicial policy in ascendancy during a given point in time.<sup>7</sup> He then states that, for purposes of his study, it is critical to recognize that the law produced during all of these periods remains good law. “Law that was meant to do away with tribes and reservations and civilize or otherwise assimilate Indians remains in effect, as does law meant to protect and make permanent Indian treaty rights and the sovereignty of native nations.”<sup>8</sup> In an attempt to convey the full impact of this state of contradiction in federal Indian law, Professor Biolsi suggests that it might be appreciated if we could imagine what it would be like if the laws of slavery and the constitutional amendments which outlawed slavery, or if *Plessy v. Ferguson*,<sup>9</sup> and *Brown v. Board of Education*,<sup>10</sup> all remained equally “good law” in the present.

The upshot of all the contradictory law from different historical periods that remains valid is that when rights are asserted in Indian country, which inevitably concern the rights of Indian people versus the rights of non-Indians, litigants come to court with

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[hereinafter “BIOLSI”].

5. BIOLSI, *supra* note 4, at 13.

6. *See id.*

7. For example, the last century of Indian policy in the United States is typically divided into the following sequence of four periods: (1) the “civilization” period, 1880-1934 (uniformity/assimilation); (2) the Indian New Deal, 1934-1950 (uniqueness/separatism); (3) the “termination” period, 1956-1968 (uniformity/assimilation); and (4) the “self-determination” period, 1968 to date, (uniqueness/separatism). *See* BIOLSI, *supra* note 4, at 14-16.

8. *See* BIOLSI, *supra* note 4, at 16.

9. 163 U.S. 537 (1896).

10. 347 U.S. 438 (1954).

legally compelling but profoundly contradictory sets of law.<sup>11</sup> For example, when the Rosebud Sioux Tribe enacted its uniform commercial code in 1989 (pursuant to the Tribe's sovereign power to exercise some form of civil jurisdiction over non-Indians), local non-Indians routinely complained that the requirement was tantamount to taxation without representation since they had no vote in Tribal matters (in violation of their well settled constitutional rights).<sup>12</sup> Further, this pervasive contradiction propagates litigation and judicial close calls and reversals, which are often based on technicalities that only pretend to reconcile the opposing sets of law.<sup>13</sup> Consequently, claims for substantive rights remain unsettled even after judgments have been rendered, because losers are typically unsatisfied with court decisions that they perceive as having been "settled" on the basis of technicalities and with complete disregard for the plain language of the law.<sup>14</sup> The unfortunate result, according to Professor Biolsi, is that "litigation over race based rights-claims is necessarily a zero-sum political game, in which wins for Indian people represent losses for whites, and vice versa."<sup>15</sup>

After introducing his book by making the case that, rather than mediating local ill feeling, Indian law serves to provoke racial tension, political struggle and litigation, Biolsi then provides a short history of the Rosebud Sioux Tribe. The Fort Laramie Treaty of 1868 established the Great Sioux Reservation, which included, as the "permanent home" of the Lakota, the entire western half of present-day South Dakota. In 1889, the Great Sioux Agreement established Rosebud and other reservations. In addition to having the same legal force as a treaty, the Agreement was also a product of the federal government's policy of civilizing Indians through the institution of private property, "as envisioned in the General Allotment Act (or Dawes Act) of 1887."<sup>16</sup> It is now well-known that

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11. *Id.* at 17.

12. *See* BIOLSI, *supra* note 4, at 153-163.

13. *Id.* at 17-18.

14. *Id.* at 18.

15. *Id.*

16. *See* BIOLSI, *supra* note 4, at 20-21; *see also* PETER MATTHIESSEN, *IN THE SPIRIT OF CRAZY HORSE* 17-19 (1983).

In remarks to philanthropists in 1885, Senator Henry L. Dawes, disapproving of the Indians' communism huffed that 'They have got as far as they can go, because they own their own land in common.' He also observed that 'There is no selfishness, which is at the bottom of civilization.' Teddy Roosevelt characterized the legislation as 'a might

another purpose of the Allotment Act was to open up great tracts of land to the non-Indian homesteaders flooding the prairies. Thus, the Great Sioux Agreement also provided for the allotment of the reservation lands it established, and it purported to “restore” eleven million acres outside the separate reservations to the public domain.<sup>17</sup>

Allotment of the Rosebud Reservation commenced in 1893.<sup>18</sup> In 1906, Congress passed the Burke Act,<sup>19</sup> which authorized the secretary of the interior to issue a patent-in-fee simple for an allotment. As a result,

Todd County/Rosebud Reservation quickly became ‘checkerboarded’ with non-Indian lands, and the non-Indian population quickly rose . . . Todd County . . . was a subdivision of the state of South Dakota, where taxable land existed and where state citizens – both non-Indians and, arguably fee-patented Indians – were subject to state jurisdiction.<sup>20</sup>

The devastating depletion of the national Indian land estate through the allotment process is generally described in terms of total acreage lost: 86 million acres between 1887 and 1934.<sup>21</sup> Biolsi’s book scrupulously tracks the jurisdictional struggles that arose directly from allotment in and around the Rosebud Reservation. In so doing, his study complements a more general understanding of the Indian land base lost nationwide by bringing home, in a manner of speaking, the jurisdictional havoc that resulted from checkerboarding. In fact, the bulk of his book is devoted to the litigation and the political struggles between the Tribe and the State of South Dakota and its white citizens over the boundaries of the Reservation and over how the “political space” of Rosebud/Todd County is to be organized. Respective chapters chronicle a struggle in the mid-1970s over the boundaries of the Rosebud Reservation; a dispute in the 1980s over a liquor store in the city of Mission, which was incorporated within the boundaries of the Rosebud Reservation; a conflict between the Tribe and the State over jurisdiction on highways running through the

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pulverizing machine to break up the tribal mass.’

*Id.*

17. See BIOLSI, *supra* note 4, at 210.

18. *Id.* at 122.

19. Ch. 2348, 34 Stat. 182 (1906) (codified at 25 U.S.C. § 349 (2001)).

20. BIOLSI, *supra* note 4, at 28.

21. See FRANK POMMERSHEIM, BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE 20 (1995).

Reservation; and the assertion of tribal jurisdiction over non-Indians living on the Reservation.

Biolsi asks why jurisdictional issues have become the central struggle and tries to show the consequences of this fact. He answers by arguing that the discourse of federal Indian law both creates and limits the types of rights and claims that are actionable, both politically and legally, for Indian people: “[i]t creates a determinate channel of allowable grievances that must suffice for those grappling with a much larger range of systemic domination and social injustice.”<sup>22</sup> Thus, jurisdictional rights claims bear the heavy burden of addressing the whole picture of Indian oppression.<sup>23</sup> Biolsi emphasizes that he is not critiquing jurisdictional struggle under the aegis of sovereignty as somehow inauthentic.<sup>24</sup> Rather, he is making the point that, at present, it is the only practical way to address more wide-ranging oppressions. “And this is why Indian people respond aggressively to even apparently minor assertions of local self-government by subdivisions of the state, which are seen as *racism* by Indian people.”<sup>25</sup>

Biolsi also makes it clear that a central argument of his book is that Indians and non-Indians were compelled to become enemies by forces beyond their control.<sup>26</sup> He observes that, despite clear differences, the similar class/regional situation of Indian and non-Indian people who become enemies (over local jurisdictional struggles) can potentially be a strong unifier.<sup>27</sup> In this context, he asks whether it is reasonable to wonder why these so-called enemies fail to entertain their common interests against the powerful outside forces that bring them, among other things, unemployment, the lack of child-care services and the general de-

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22. See BIOLSI, *supra* note 4, at 181-182.

23. See *id.* at 181.

24. He does, however, join those who observe that:

[b]y the logic of Indian self-determination and autonomous nationhood as structured by the discourse of federal Indian law, the more tribal sovereignty is formally realized under existing federal Indian law, the more difficult it is for [Indian] people to make credible legal and political claims regarding the full range of daily forms of oppression they are subjected to.

See *id.* at 189.

25. *Id.* at 190.

26. See *id.* at 198.

27. See *id.* at 195.

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funding of social programs.<sup>28</sup>

In his conclusion, Biolsi argues that the Indian law discourse does not merely have the political effect of inciting local people to become enemies. He challenges us by asserting that its most critical effect is the production of white innocence. “By making local white and Indian people highly visible deadliest enemies, the discourse of Indian leaves in the shade we *other whites* who might otherwise be called to account in the native struggle for racial justice.”<sup>29</sup>

Biolsi ends his meticulously researched book by asking us to be vigilant and recognize that the discourse of Indian law is not driven by a will to racial justice that guarantees its humane unfolding. That said, he optimistically advises that American Indian people have historically used the law in ways unforeseen or unintended by the elites who wrote it and that we should expect nothing less in the future. “The law – federal Indian law or some other kind – will continue to be at the center of the struggle for justice for native people, and for us all.”<sup>30</sup> Let us hope that Professor Biolsi is not mistaken.

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28. *See id.*

29. *Id.* at 207 (emphasis in original).

30. *Id.* at 210.